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Draft legislative provisions on interim measures and the form of arbitration agreement – Draft declaration regarding the interpretation of articles II (2) and VII (1) of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards

Comments received from Member States and international organizations

Addendum

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* Submission of this note was delayed because of its late receipt.

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II. Comments received from Member States and international organizations

A. Member States

4. France

[Original: French]
[29 May 2006]

General remarks

1. The French delegation notes with regret that the Working Group's method of functioning did not fully meet its expectations. It felt that, on numerous occasions, every effort had not been made to reach truly consensus solutions. For example, the Working Group unfortunately did not take into account the reservations expressed—by a majority at the last plenary session—regarding "preliminary orders" and preferred to make no amendments whatsoever to the provisions drafted on this issue. Also, it adopted a provision on "anti-suit injunctions" despite the reservations expressed by many delegations. The reports of the Working Group are sometimes elliptical on these matters and do not sufficiently make the point that a compromise could be achieved only under particularly difficult conditions.

2. As to substance, the French delegation gives a mixed appraisal of the work of the Working Group, in which it nonetheless participated positively and constructively. While the definitions of interim measures that can be ordered by an international arbitrator are generally welcome, many provisions are overly cumbersome—as a comparison with the original provisions of the Model Law reveals—if not questionable from the perspective of arbitration practice.

3.From the viewpoint of France, all of this compromises the quality and desired universal scope of the new model legislative provisions. A symposium held last February at the Senate in Paris on the UNCITRAL project showed that for a good many French legal writers and arbitration practitioners the model provisions gave rise to numerous, strong reservations, which are largely in line with those formulated by the French delegation during the course of the work.

Interim measures of protection

Draft article 17 (2) (b): anti-suit injunctions

4. The French delegation is opposed to the inclusion of "anti-suit" measures among ordinary interim measures. Measures of this type do not fall into the category of interim measures. Also, they are alien to the continental law tradition. Anti-suit injunctions are questionable since they deny a party the legal remedies to which it is normally entitled. Hence such a course of action is challengeable within the European Union.[1]

[1] See, on this point, the judgement of the European Court of Justice of 27 April 2004 in Case C-159/02 (Turner), which ruled that the Brussels Convention precludes "*the grant of an injunction whereby a court of a contracting State prohibits a party to proceedings pending before it from commencing or continuing legal proceedings before a court of another contracting State*".

5. The French delegation wishes to request the deletion of this provision, which was inserted in the revised provisions without any extensive discussion of the potential consequences on the structure of the provisions as a whole (cf. point 1 above).

Draft article 17 ter: preliminary orders

6. A large group of countries shared the French delegation's major objections to such measures, believing that they ran counter to party autonomy, the foundation of international commercial arbitration. These measures might also infringe the principle of equal treatment of parties. The French delegation thus proposes once again—this suggestion having received the support of many delegations at the previous session—that such measures be permitted only if they have previously been accepted by the parties in their arbitration agreement. This positive option would not in any way preclude the possibility of the effective use of these measures since it could be inserted in a model arbitration agreement to which the parties may refer for the settlement of their disputes. It therefore constitutes a genuine compromise arrangement which could make acceptable the introduction in arbitration law of ex parte measures which have been accepted in the form of preliminary orders.

Draft article 17 quater, paragraph (4): unenforceable nature of preliminary orders

7. Somewhat illogically, given the Working Group's interest in this innovative extension of the arbitrator's powers, it has been stipulated that "[a] preliminary order shall be binding on the parties but shall not be subject to enforcement by a court". This would rob these measures of much of their effectiveness since juridical persons, in particular banking establishments, which the arbitrator will approach to obtain the execution of such orders, would be unable to comply without a writ of enforcement. It would therefore be desirable to delete that sentence while retaining the following one, which states that a preliminary order does not constitute an award.

Draft article 17 decies: grounds for refusing recognition/enforcement

8. The French delegation can only reiterate its position on this matter. The proposed text, which combines provisions based on the New York Convention and relating to arbitral awards with provisions stemming more specifically from requirements concerning interim measures, constitutes a set of clauses incorporating excessive and disproportionate double conditions.[2]

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[2] It is recalled that the French delegation had proposed a more concise wording:
(1) An interim measure of protection issued by an arbitral tribunal shall be recognized as binding on the parties and [unless otherwise provided by the arbitral tribunal] enforced upon application by the party which obtained it [or by the arbitral tribunal] to the competent court, irrespective of the country in which it was issued.
(2) The court may refuse to recognize [and] [or] enforce an interim measure of protection only if:
(a) Upon the request of a party the court is satisfied that:
- That party was not given notice of the appointment of an arbitrator or of the arbitral proceedings;

Written form of arbitration agreement

9. The French delegation agrees with the substance of the draft provisions prepared by the Working Group. However, it proposes that their wording be more succinct. In particular, the revised draft article 7 contains a paragraph (4) on electronic communication, which could be deleted or abridged since it constitutes a definition and not a prescriptive rule. Reference might simply be made to UNICTRAL documents dealing with electronic commerce.

10. Surprisingly, the omission of the writing requirement has also been proposed as an alternative. The French delegation does not wish this other arrangement to appear in the revised provisions. It would greatly weaken the provisions adopted by the Working Group with a view to embracing as closely as possible the current situation regarding arbitration law on this matter. In general, it is desirable to make as limited use as possible of variants, the aim being to guide States towards solutions that appear the most appropriate. Most importantly, the proposal to totally remove the requirement of written form had not received the Working Group's agreement.

- The party against whom the measure is directed was unable to present its case under the conditions of article 17;
- The arbitral tribunal did not have [was deprived of] the powers to order any such interim measure of protection;

(b) The court finds that:

- The requested measure is incompatible with the powers conferred upon the court by its laws unless the interim measure can be reformulated to adapt it to those laws;
- The recognition or enforcement of the interim measure would be contrary to the public policy recognized by the court.